

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
MSC.SOFTWARE CORPORATION, )  
a corporation. )  
\_\_\_\_\_ )

Public Record Version

Docket No. 9299

To: The Honorable D. Michael Chappell  
Administrative Law Judge

**COMPLAINT COUNSEL'S OPPOSITION TO  
RESPONDENT MSC.SOFTWARE CORPORATION'S  
MOTION FOR PROTECTIVE ORDER**

Respondent's Motion For Protective Order seeks to limit the scope of the response required to comply with Complaint Counsel's Document Request, or to shift to Compliant Counsel the costs of responding to discovery requests from electronic documents. The Motion should be denied for three reasons: (1) Respondent has not timely raised these issues; (2) Complaint Counsel already has made significant and sufficient accommodations to concerns Respondent raised; and (3) Respondent does not satisfy the criteria that might justify, in extraordinary circumstances, the costs of production to the requesting party. A draft Order denying Respondent's Motion for Protective Order is attached. (Attachment A).

Your Honor's outstanding Order of January 18, 2002, directed Respondent to comply with Complaint Counsel's Document Request in ways it previously had promised to comply, and directed Respondent to work with Complaint Counsel to resolve outstanding document discovery disputes by January 25, 2002. Rather than comply with that Order, Respondent's Motion reasserts objections to the Document Request that it previously abandoned, and reneges on promises Respondent previously made to Your Honor to comply with the Document Request.

The current attempt to re-litigate already decided issues does not move this matter forward toward the scheduled May 21, 2002, trial date.

Complaint Counsel, throughout the long sequence of events in connection with this document discovery dispute, has sought to identify and resolve any unreasonable burdens created by its Document Request.<sup>1</sup> Respondent's Motion for Protective Order presented new information about electronic document, e-mail, archive, and backup systems that never had been presented to Complaint Counsel during negotiations.<sup>2</sup> While the newly-presented facts do not justify

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<sup>1</sup> For example, since Your Honor last considered discovery disputes related to the Document Request, Respondent presented Complaint Counsel with some of the information Complaint Counsel had requested about the backup systems, and Complaint Counsel agreed in a letter of February 1, 2002, to limit the scope of search of backup tapes to a list of 15 carefully selected, named individuals (Attachment B). Complaint Counsel even pro-actively explored with Respondent whether further limitations on the scope of search of backup tapes could be made, by excluding from the scope of search daily, weekly, or monthly backup tape systems which may contain overlapping data. Rather than answer the questions Complaint Counsel posed to Respondent about the possible overlaps, Respondent cut off all communications with Complaint Counsel and filed its Motion instead. (Attachment C, Statement of Karen A. Mills). Similarly, Complaint Counsel explored with Respondent whether the costs and any burden of producing electronic documents belatedly identified by Respondent could be ameliorated after Respondent explained to Complaint Counsel for the first time a letter of January 29, 2002, (Attachment D), that Respondent planned to produce electronic documents in a printed hard copy for that Complaint Counsel had not requested. Complaint Counsel inquired whether Respondent could reduce the time and cost of production if it produced the electronic documents to Complaint Counsel in electronic form, rather than printing them out. (Attachment C, Statement of Karen A. Mills.)

<sup>2</sup> Respondent did not discuss these newly presented facts with Complaint Counsel before filing the Motion for Protective Order. The newly presented facts include an affidavit of Connie Stokes, describing Respondent's archived documents retention and retrieval system, quantifying the number of archived boxes, attaching a list of subject or department codes used to identify archived documents, and identifying the quantity of documents stored and attributable to one of those codes, "EO" (Executive Office). The newly presented facts also include a description by Respondent (unaccompanied by any sworn statement or documentation) of the procedure Respondent chose to identify responsive electronic documents, and a letter from Merrill

granting Respondent's Motion for Protective Order, they prompted Complaint Counsel to renew discussions with Respondent to explore the newly asserted burdens. Complaint Counsel have re-engaged Respondent in negotiation by posing a series of more specific questions about the electronic document, archive, e-mail and backup systems, and about persons currently within the scope of search, and by exploring possibilities for reducing any burdens that may exist. As of this filing, Complaint Counsel still are awaiting answers to those questions, and the more specific information it has sought.

While these negotiations are ongoing, Complaint Counsel file this Opposition because Respondent has not withdrawn its Motion, and because, based on the information presented to Your Honor, it is clear that Respondent has failed to meet its burden of proof under Rule 3.31. Complaint Counsel remain hopeful that we can, by agreement, close the gap on disputes surrounding the Document Request. To the extent that any disputed issues cannot be resolved, however, the present record would not justify either Your Honor's imposing limitations on Complaint Counsel's Document Request, or shifting the costs of production to Complaint Counsel. Therefore, we urge that Respondent's Motion for Protective Order be DENIED, even as the parties attempt timely, negotiated resolution of document discovery disputes.

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Corporation estimating separately, presumably pursuant to that procedure, proposed the costs of electronic data conversion, search and consulting services, and printing costs. Respondent did not submit with its Motion, and never has provided to Complaint Counsel any detailed sworn statements describing Respondent's backup systems or the procedures for or costs of recovering the documents, despite the fact that Complaint Counsel has requested this since November. Respondent supplies with its motion only a letter from Merrill Corporation quoting an hourly rate for recovery of backup data. Respondent's Motion provides no sworn statements about the procedure for and costs of producing responsive e-mail.

## ARGUMENT

### 1. Respondent's Motion is Not Timely and Its Burden Claims are Unsubstantiated

#### a. Respondent Did Not Timely Identify and Substantiate Burden Claims

Respondent's Objections to the Document Request, if any, were due under the Rules on or before the response date of the Document Request, which was December 12, 2001, two and half months ago. Respondent registered no objections to production of electronic documents by that date. As Complaint Counsel proposed in its December 27, 2001, Motion to Compel, having raised no timely objections to production of electronic documents, Respondent should be precluded from raising them now.

Electronic discovery issues were not difficult for Respondent to anticipate. Complaint Counsel even called them to Respondent's attention with Specification 2 of the Document Request. Specification 2 called for production of information by Respondent about the nature of its electronic record-keeping systems, and the costs of production therefrom, including the costs of production in response to the Document Request.<sup>3</sup> Complaint Counsel sought this information in order to determine how to conduct focused and efficient document discovery of materials in Respondent's electronic systems.

In written objections submitted on December 3, 2001, Respondent refused to supply the requested information, saying that it did not keep such information in the ordinary course of

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<sup>3</sup> Complaint Counsel was entitled to this discovery under Rule 3.31(c)(1), which allows discovery of information about "the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter."

business. Respondent's refusal to produce information in response to Specification 2 made it impossible for Complaint Counsel to assess or accommodate burden claims concerning electronic materials. Respondent still has not provided detailed information, making it impossible for either Complaint Counsel or Your Honor to assess or accommodate the burden claims pressed in Respondent's Motion, or to determine whether tailored modifications of the Document Request might relieve them.<sup>4</sup>

Complaint Counsel predicted two months ago, when it filed its first Motion to Compel on December 27, 2001, that we -- Respondent, Complaint Counsel, and Your Honor -- might find ourselves exactly where we are today if Respondent were not required to respond to Specification

2. We wrote then:

Respondent objects to Specification 2's request for production of documentation about document retention and destruction policies, computerized backup procedures, and the cost and recovery of backup computer files and documents. Respondent claims this Specification calls for production of documents not kept in the ordinary course of business. During the Part 2 investigation, however, Respondent claimed it would be burdensome to produce responsive documents from backup computer files. While Respondent has been silent on this issue in Part 3, and has not objected to production of responsive documents from backup computer files, Complaint Counsel anticipate that Respondent will simply decline or refuse to produce responsive documents from its backup computer files and/or make belated burden claims later in the case. Having failed to object to production from backup computer files, and having refused to provide information that would show the extent of any purported burden, Respondent should be precluded from making burden claims later and should be required now to produce responsive documents and information from its backup computer files.

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<sup>4</sup> Although Respondent's Motion for Protective Order in text seeks to limit the scope of information Complaint Counsel is entitled to, Respondent does not explain in the text of its Motion what limitations it seeks, and does not attach a proposed Motion containing proposed limitations.

Respondent should not be allowed to have it both ways, on the one hand refusing to provide information needed to assess and accommodate any burden claims, while on the other hand seeking to limit the Document Request or shift the costs of compliance.

**b. Request For Relief From Costs of Production Already Incurred Is Not Timely**

Respondent's request for relief from costs of production of electronic documents it already has incurred is not timely. Under no circumstances is a responding party, under either Commission or Federal Rules precedent, entitled to seek to shift costs of production already incurred to a requesting party. This follows because neither the requesting party nor the Administrative Law Judge was in a position to ameliorate these costs. In the Matter of International Telephone and Telegraph, 97 F.T.C. 202 (Interlocutory Order, March 13, 1989) See also, Sunkist Growers, 1978 FTC LEXIS 194 (August 22, 1978)(Order Denying "Application for Review" Of Order Denying Sunkist's Motion For Payment of Copying Costs, Miles J. Brown, Administrative Law Judge).

Respondent's Motion alleges that it was incapable of bringing an approximation of anticipated expenses to Your Honor's attention before incurring them, and does not distinguish between costs already incurred and costs merely anticipated<sup>5</sup>. Such information would be essential to Your Honor, if Your Honor were to consider shifting any of the cost of production to Complaint Counsel. Absent such detail, no order shifting costs properly could be entered.

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<sup>5</sup> Based on conversations with Respondent, and information contained in Respondent's letters and Motion, Complaint Counsel has reason to believe that at least some of the costs already have been incurred.

2. **Complaint Counsel Already Have Made Significant and Sufficient Accommodations**

Complaint Counsel already have modified the Document Request by redrafting Specifications 3 and 9, and by excluding from the scope of production contract files for contracts with a value of less than \$25,000. Without acknowledging these modifications, Respondent bases its argument that Complaint Counsel's Document Request is overbroad on one example, citing Specification 9 of the original Document Request, that is, before its modification. But Complaint Counsel modified Specification 9, along with Specification 3 and the scope of search for contracts, in a December 26, 2001 modification letter, previously presented to Your Honor with Complaint Counsel's December 27, 2001, Motion to Compel, and again with Complaint Counsel's most recent Motion to Compel.

If Respondent's objections to electronic document production had been timely raised, and not already adjudicated, they would merit no further modifications of the Document Request based on the information Respondent has presented. Respondent does not even now specifically describe what modifications it seeks to the Document Request, either in its Motion or proposed Order. Respondent seeks now to re-raise previously abandoned objections to such aspects of the Document Request as the geographic scope of search, and the time period covered by the document request, without any indication of how, or to what extent these matters pertain to the burdens it alleges here.

3. **Prospective Costs Should Not Be Shifted To Complaint Counsel**

Both Commission precedent and Federal Rule of Civil Procedure 26(c) presume that in most cases, a responding party must absorb the reasonable expenses of production as a cost of

doing business. Only in the extraordinary case, and when a burden of proof that the expenses of production are “undue,” or unreasonable has been satisfied by the responding party, have Administrative Law Judges, the Commission, or federal courts shifted the costs of production not already incurred, and not incurred to the benefit of a responding party, to a requesting party. Respondent has not met that burden of proof, and therefore Respondent’s motion for a Protective Order shifting costs of Respondent’s compliance with the Document Request should be denied.

Respondent cites Rowe Entertainment, Inc. v. William Morris Agency, Inc., 2002 U.S. Dist. Lexis 488 (S.D.N.Y. January 16, 2002), as outlining the factors Your Honor should consider when deciding whether to shift costs of production to Complaint Counsel. While Complaint Counsel does not concede that Rowe establishes the framework for review of cost shifting by the Commission under the Rules, Complaint Counsel use Rowe to structure this argument.

When judging whether the costs of production of electronic discovery are “undue” as contemplated by Rule 26(c), and whether any cost shifting to the requesting party is appropriate, Rowe recognizes that courts have adopted a balancing approach, taking into consideration such factors as: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party. Rowe, Id. Respondent’s Motion discusses only five of the eight Rowe factors, and even as to

these, Respondent misreads the law and misrepresents the facts. Where all of the 8 factors are properly considered, they weigh overwhelmingly against shifting the cost of production to Complaint Counsel.

**a. The Specificity of the Discovery Requests Weighs In Favor Of Complaint Counsel**

Rowe suggests that if discovery requests are overbroad, this factor weighs in favor of shifting costs to the requesting party. Complaint Counsel's Document Request is not overbroad, and therefore this factor weighs against cost-shifting.

Respondent claims Complaint Counsel's document request is overbroad, but does not specify how, except to give two examples, taken from Specifications 3 and 9. But as noted above, Specification 9 of Complaint Counsel's original Document Request was modified by Complaint Counsel on December 26, 2001. It is impossible for Complaint Counsel or this court to determine from Respondent's Motion, therefore, whether Respondent considers Specification 9, as modified, to lack specificity.

**b. The Likelihood of Discovering Critical Information, and The Availability of Such Information From Other Sources, Weigh in Favor of Complaint Counsel**

Complaint Counsel have requested priority production of responsive electronic documents from a list of carefully identified individuals, production of archived files those individuals, including individuals who are no longer with the company, and production of electronic documents from the backup tapes of only 15 carefully specified individuals. Complaint Counsel proposed to limit its request in this fashion because a search of these backup tapes and archived documents is likely to lead to discovery of critical information, and could not be obtained from other sources. Respondent has not demonstrated otherwise. Therefore, Rowe factors numbers 2 and 3 weigh

against shifting the cost of production to Complaint Counsel.

Respondent's Motion admits that it is likely that relevant documents would be collected from a search of electronic documents and e-mail documents. Respondent has identified none of these identified individuals as unlikely to have critical information in e-mail or electronic documents, and Respondent's general claims that electronic documents and e-mails are likely to be duplicative of already produced hard copy are unsubstantiated.<sup>6</sup> As it relates to electronic documents or e-mail documents, therefore, this Rowe factor does not weigh in favor of Respondent, and any objection Respondent makes to search for or production of such documents at its own expense, based on relevance or alternative availability, should be rejected.

Complaint Counsel already has considered Respondent's arguments, however belatedly presented, that information in backup tapes and archived documents might not be critical or is likely to be found through other sources, and in recognition of those arguments, proposed in a letter to Respondent of February 1, 2002, (Attachment B).<sup>7</sup> Respondent's refusal to respond to

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<sup>6</sup> This case differs from both of the cases Rowe discusses as examples where shifting the cost of production to the requesting party was justified, Anti-Monopoly, Inc. v. Hasbro, Inc., 1996 U.S. Dist. Lexis 563 (S.D.N.Y. Jan. 23, 1996), and Williams v. E.I. du Pont de Nemours & Co., 119 F.R.D. 648, 649-50 (W.D. Ky. 1987). In those two cases, but not in this case, the requesting party sought information in electronic form that already had been produced to it by the responding party in hard copy. Complaint Counsel does not seek production of responsive information in electronic form that already has been produced to it by Respondent. In fact, Complaint Counsel's document request makes clear that identical documents need not be produced multiple times.

<sup>7</sup> Complaint Counsel made this proposal to recover backups for 15 individuals in reliance upon Respondent's representation in a January 31, 2002, telephone conversation that Respondent's backup system created a database identifying, inter alia, the individuals whose data was contained on each backup tape. On Tuesday, February 26, 2002, Respondent claimed to have no recollection of this conversation. Respondent has offered to permit Complaint Counsel

this proposal occasioned Complaint Counsel's most recent Motion to Compel production, including production of responsive documents from backup tapes and archived documents of this limited list of critical individuals. Respondent has not explained to Complaint Counsel or this court how Complaint Counsel's request for production of responsive documents from backup tapes and archived documents of these specified individuals is unlikely to lead to production of critical information, or from what other sources responsive information from the specified individuals' backup tapes or archived documents is available. Absent any such explanation, Rowe factors 2 and 3 do not weigh in favor of Respondent.

c. **The Purposes for Which the Responding Party Maintains the Requested Data Weigh In Favor of Complaint Counsel Where Respondent Has Not Met Its Burden of Proof**

Respondent claims that Rowe factor 4 weighs in its favor. It does not. In Daewoo Elec. Co. v. United States, 650 F. Supp. 1003, 1006 (C.I.T. 1986), the court held: "The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship. ... Similarly, a normal and reasonable degree of direct communication and assistance to the discovering party is the unavoidable burden of the respondent, in the absence of a showing of extraordinary hardship." Respondent has shown no extraordinary hardship of the kind Daewoo recognizes might justify a departure from the Federal Rules' presumption that a responding party must bear the expense of complying with discovery requests.

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to speak directly to Respondent's information technology specialist most familiar with the backup system and its capabilities for recovering tapes of the 15 individuals, but Respondent has not been able yet to arrange a time for such a conversation.

Rowe, 2002 U.S. Dist. Lexis 488, at 29, does say that “a party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it.” But Rowe does not (and could not) hold that in all cases, backup tapes fall into this category. In that case, on the facts presented by the party from whom discovery was sought, there was no evidence that the party from whom discovery was sought ever searched backup tapes or even had a means for doing so. Rowe, Id. Rowe concluded, on the facts of that case, that the cost of producing deleted e-mails should be shifted to the requesting party because, the court concluded, discovery of deleted computer documents does not have a close analogue in conventional, paper based discovery, and because there was no showing that defendants accessed their deleted e-mails. Id. at 29-30.

In this case, Complaint Counsel does not seek production of deleted e-mails, and Respondent has presented no evidence that it does not retain and never utilizes electronically stored e-mails, electronically stored documents, backup tapes, or archived documents for current business purposes, or that it has no means for searching such archived or electronic documents.<sup>8</sup> Absent such a showing, Rowe factor number 4 weighs against departure from the presumption

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<sup>8</sup> In order to obtain information not yet supplied by Respondent, even in its Motion, Complaint Counsel has sought from Respondent information about whether Respondent has retrieved any documents from archives in the past year, what information was sent to the archives in the past year, what records exist of what information was sent to the archives since January 1, 1999, whether the archives contain a code identifying UAI documents, whether Respondent has asked any of the persons on the search list whether they have any record of what they sent to the archives, and whether Respondent previously searched the archives in response to Federal Trade Commission’s Part 2 investigation. We are awaiting answers to these questions.

that Respondent should bear the cost of producing responsive documents from e-mails, electronically stored documents, backup tapes, and archived documents.

d. **The Relative Benefit to the Parties of Obtaining the Information Weighs in Favor of Complaint Counsel and Against Cost Shifting**

Respondent does not address this Rowe factor, but it, too, weighs in favor of Complaint Counsel and against cost shifting. There is less rationale for shifting costs of production of computer stored information to a requesting party where, as here, the responding party itself benefits from the production. Rowe, Id. at 30, citing Bills v. Kennecott Corporation, 108 F.R.D. 459, at 464 (D. Utah 1985). See also, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978); Petroleum Products Antitrust Litigation v. Kerr-McGee Corporation, 669 F.2d 620, 623-624 (10<sup>th</sup> Cir., 1982) (shifting cost to requesting party where no benefit from the requested production inured to the benefit of the producing party, a non-party to the litigation). Rowe recognized that benefit to the responding party could come in one of two forms: (1) collateral benefits for the responding party's business, or (2) benefit to respondent in litigation from review of its own records.

In this case, review by Respondent of its own electronic and archived documents is likely to inure to the benefit of Respondent in litigation. Respondent will have the benefit of a review of the same records as it proceeds to prepare its defense in this case. This Rowe factor therefore weighs against cost shifting to the requesting party, since not only Complaint Counsel, but also Respondent, will benefit from the production.

e. **The Total Cost Associated With Production Weighs In Favor Of Complaint Counsel on the Facts of This Case**

It is unclear from Respondent's Motion what Respondent estimates to be the total cost of

production that Respondent proposes to shift to Complaint Counsel. As discussed above, to the extent Respondent's cost estimates include any costs already incurred, or incurred to the benefit of Respondent itself, such costs are not cognizable as appropriate for shifting to a requesting party under any circumstances.

Furthermore Complaint Counsel believe that Respondent's cost estimates are inflated, particularly if Complaint Counsel's efforts are successful, and Respondent provides further information about its electronic systems that enable the discovery to be narrowed and focused. For example, where backup tapes are indiscriminate, random, and do not catalogue the information they contain, such that it is impossible to know in advance what is on the backup tapes, one court applying the Federal Rules ordered a responding party to conducted a test restoration of sample backups and to carefully document the time and money spent doing the search with a comprehensive, sworn certification. That court decided that it would then, and only then, permit the parties to argue why the results and the expense did or did not justify any further search. McPeck v. Ashcroft, 202 F.R.D. 31 (D.D.C., August 1, 2001). Here, prior representations of Respondent's Counsel suggest that, Respondent's backups are not indiscriminate, random, and lacking in a catalogue of the information they contain. Respondent presents no sworn certifications as to the factual basis for Respondent's claims about the nature and accessibility of backup systems, or the the cost of producing the requested backups, based on any sample test recovery.

f. **The Relative Ability of Each Party to Control Costs and its Incentive to Do So Weighs in favor of Complaint Counsel and Against Cost Shifting**

Respondent's Motion, at page 19, claims that "the ability to control the costs associated

with the document production rests squarely with Complaint Counsel.” This is not the question Rowe poses. Rowe poses the question: what is the relative ability of each party to control costs and its incentive to do so? The answer to this question is: Respondent has the greater ability to control costs because it is in control of its own electronic systems and persons familiar with them, and therefore has the information about how they are organized and what they contain.

Complaint Counsel has made vigorous efforts to control costs, within the means available to it. First, Complaint Counsel carefully drafted a Document Request aimed at discovery of specific, discoverable information, and even attempted to discover from the outset what burdens discovery of electronic documents might impose. Complaint Counsel has made significant efforts already to control costs by modifying Complaint Counsel’s document request and by diligently seeking from Respondent information that might justify further modifications.

Complaint Counsel continue to make such efforts. As Respondent acknowledges in its Motion, at p. 20, fn. 15, Complaint Counsel offered to consider further restriction of the number of individuals from whom production of e-mail and electronic documents were sought, and has asked Respondent to identify specific individuals from Complaint Counsel’s already restricted search list not likely to have responsive information, or whose information is likely to be less relevant or duplicative. Respondent has asked, instead, that Complaint Counsel use Respondent’s organization charts and Complaint Counsel’s own initiative to guess at who might be eliminated from the search list.

Much of Respondent’s argument that production is burdensome derives from Respondent’s own failure to use and maintain its record-keeping systems, as evidenced in part by

the Affidavit of Connie Stokes, attached to Respondent's Motion as Exhibit D. Courts applying the Federal Rules have held that "[t]o allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules." Kozłowski v. Russell, 73 F.R.D. 73, (D. Mass., 1976). Furthermore, where, as here, the failure to produce records "... is due basically to an indexing system of its own devising, so maintained as to obstruct full discovery," Id., at 11, courts interpreting the Federal Rules have declined to tax the requesting party with the costs of production.

Complaint Counsel has no ability to control defendant's record-keeping scheme. Under such circumstances, courts applying the Federal Rules have declined to require the requesting party to bear the burden caused by the respondent's choice of record keeping or electronic storage. See, e.g., In Re Brand Name Prescription Drug Antitrust Litigation, 1985 U.S. Dist. LEXIS 8281 (N.D. Ill., June 13, 1995).

**g. The Resources Available to Each Party Is at Most a Neutral Factor**

Rowe proposes that the ability of each party to bear the costs of discovery may be an appropriate consideration when considering whether costs of obtaining discovery should be shifted to the requesting party. But on the facts in Rowe, the court determined that all parties had sufficient resources to conduct the litigation, and therefore considered the relative financial strength of the parties a neutral factor. Rowe, Id. at 33. Here, Respondent has not demonstrated that the cost of discovery outstrips Respondent's resources, or that Complaint Counsel is financially better able to bear the costs of discovery than Respondent. This factor, then, is at best a neutral factor.

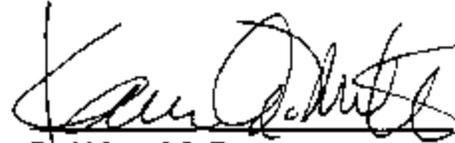
In summary, then, seven of the eight Rowe factors, when applied to the facts of this case, weigh in favor of Complaint Counsel and against shifting the cost of document discovery to Complaint Counsel. The eighth factor is, at best, a neutral factor. Respondent's request for a Protective Order based upon an application of the eight factor analysis outlined in Rowe, therefore, and the cases upon which Rowe relied, should be denied.

**CONCLUSION**

For the reasons set forth above, MSC's Motion for Protective Order should be DENIED.

A proposed order denying Respondent's motion is attached as Attachment A.

Respectfully submitted,



P. Abbott McCartney

Peggy D. Bayer

Michael G. Cowie

Kent E. Cox

Karen A. Mills

Nancy Park

Patrick J. Roach

Counsel Supporting the Complaint

Bureau of Competition

Federal Trade Commission

Washington, D.C. 20580

(202) 326-2695

Facsimile (202) 326-3496

Dated: February 28, 2002

**CERTIFICATE OF SERVICE**

This is to certify that on February 28, 2002, I caused a copy of Complaint Counsel's Opposition to Respondent MSC.Software Corporation's Motion for Protective Order (Public Record Version) to be served:

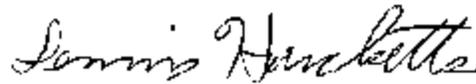
(a) via facsimile transmission, followed by hand-delivery of a copy to:

Marimichael O. Skubel, Esquire  
KIRKLAND & ELLIS  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 879-5034  
Fax (202) 879-5200

Counsel for MSC.Software Corporation

and (b) by hand-delivery of a copy to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580



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Dennis J. Harcketts

## **Attachment A**

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

<b>In the Matter of</b>	)	
	)	
	)	
<b>MSC.SOFTWARE CORPORATION,</b>	)	<b>Docket No. 9299</b>
<b>a corporation.</b>	)	
	)	

**ORDER DENYING RESPONDENT'S MOTION FOR PROTECTIVE ORDER**

IT IS HEREBY ORDERED that Respondent's Motion for Protective Order is Denied.

Dated: \_\_\_\_\_

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

## **Attachment B**



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Marimichael O. Skubel, Esq.  
Kirkland & Ellis  
655 15<sup>th</sup> Street, N.W.  
Washington, DC 20005

February 1, 2002

Re: FTC Docket No. 9299

VIA FAX

Dear Ms. Skubel,

Since Judge Chappell's January 18, 2002, order encouraging us to resolve four outstanding disputes about Respondent's compliance with Complaint Counsel's Document Request, and more specifically, since the filing of our emergency motion on January 22, 2002, two of the four outstanding disputes have been resolved by your withdrawal of your previously asserted objections. However, two issues remain unresolved. Although Judge Chappell's Order of January 25, 2002, authorized Complaint Counsel to re-file a motion to compel if the outstanding discovery disputes were not resolved by January 25, 2002, and only one of the four disputes was resolved by that date, Complaint Counsel has spent an additional week prodding you for more information and diligently attempting to resolve the remaining disputes.

Two issues have been resolved as follows:

- By letter of January 24, 2002, you withdrew your objection to producing a privilege log, and promised to provide the privilege log required by the Document Request.
- On January 30, 2002, you told me by telephone that you were withdrawing your objection to producing data responsive to specification 22 of the Document Request in the form that MSC produced the data in the Part 2 investigation, bringing up to date the two data sets generated using the "Data Mart" query and the "All" query. While Respondent now has agreed to provide data in this form, you have not committed to a production date.

Two issues remain unresolved, however, and it therefore appears that Complaint Counsel may have to seek the court's intervention:

- You offer no final production date, and the tardy and slow pace of production is unacceptable.
- You object to producing from backup tapes, and while Complaint Counsel has attempted to narrow the scope of search required, no resolution has been reached.

Marimichael O. Skubel  
February 1, 2002

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In addition, in the course of your production, a new production compliance issue has arisen:

- Respondent has indiscriminately marked documents CONFIDENTIAL and RESTRICTED CONFIDENTIAL.

We outline below a plan for production that we would find acceptable, if production were completed by February 22, 2002. Without written confirmation from you that you will produce as described by that date, we are likely to have to move to compel and put this matter again before Judge Chappell for resolution.

- Production must be completed by February 22, 2002.
- Production will be prioritized for the persons, files and offices listed on Attachment A.
- Prioritized production will include hard copy, electronic documents, and e-mails, but not backups, except as provided below.
- If any of the persons identified on Attachment A are no longer with the company, the production still will include documents resulting from a search for their documents, whether in storage, archived, passed on to other individuals, or electronically stored.
- Among the contract files, priority within the priority production will be made of the files relating to those customers we identified to you in our letter of December 14, 2001, and in Complaint Counsel's Preliminary Witness List of December 18, 2001
- Responsive documents of persons not identified in Attachment A but on the search lists you produced to Complaint Counsel on January 25, 2002, and January 28, 2002, will be produced after the priority production.
- Respondent will search backup tapes for responsive documents of the 15 individuals listed on Attachment A next to whose names we have placed a "(B)".
- Respondent will properly designate all documents entitled to be marked CONFIDENTIAL or RESTRICTED CONFIDENTIAL, and correct erroneous designations by submitting properly marked documents, by March 1, 2002.

Please advise promptly whether you agree to this resolution of the remaining outstanding issues. If not, we will be required to place the unresolved issues before Judge Chappell.

Very truly yours,



Karen A. Mills

ATTACHMENT A

Allahabadi, Rakesh (B)	MacNeal, B.*
Bakhtary, N.*	Maher, William
Baldwin, Joe	Mattson, Harold (B)
Barclay, Richard	Mehta, Anil* (B)
Barthenheiser, Keane	Morgan, Jeff* (B)
Beer, Dave	Mowrey, John
Benson, Doug*	Murphy, Rick (B)
Bentley, Steve*	Nagy, D.*
Blakely, Ken (B)	Neill, Douglas
Brar, Deepak	Parady, John*
Brown, Todd	Perna, Frank (B)
Bryce, Dan*	Platnick, Joe*
Bush, Richard	Privett, Cory
Caserio, Alan	Ramirez, R.*
Castro, Jack*	Reymond, Antoine
Central Files	Reymond, Mike
Clark, Jay*	Riordan, George*
Conrardy, Jackie	Roach, Doug
Crooks, Matthew	Robertson, Alastair
Crum, Lois*	Rose, Ted
CSA	Roundy, Lance*
Cully, Tom	Sacro, Steve*
Curry, Tom*	Sauer, Paulo
Davis, Chuck	Schultz, Jeff
DiLullo, John	Schwartz, Peter
Doyle, Dan*	Sheridan, Lynn
Dyer, Ron (B)	Sikes, Greg*
Glickman, Donald*	Smith, Jane (B)
Gockel, Mike	Smith, L.*
Grassinger, Thomas*	Smithson, Tyler
Greco, Louis (B)	Spangler, Paul
Greg, Bryan*	Stanton, Ed
Grun, William*	Stass, Bob
Harder, Robert	Swan, James*
Han, Fritz*	Swedburg, Debbie*
Hart, Bruce (B)	Swette, Robert
Heil, Joan*	St. Johns, Christopher* (B)
Hoff, Claus	Tateishi, Mars* (B)
Hubert, Lum*	Tecco, Thomas*
Hunt, H. Harris*	Thornton, Brian
Ibrahim, Omar	Torres, Bill
Johnson, Dan*	Towles, Linda
Jones, Edward* (B)	UAI*
Kenyon, Mark	Wallerstein, Dave
Krauski, Mike* (B)	White, James*
Kurifink, Robert	Williams, Charles
Layfield, Dale	Wilson, Charles
Long, Lou*	Wright, Paul*
Long, Jon*	Asia-Pacific offices
Louwers, Robert	European offices
MacKay, John*	South American offices
	Contract Files

**Attachment C**

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
MSC.SOFTWARE CORPORATION,	)	Docket No. 9299
a corporation.	)	
	)	

Statement of Karen A. Mills Pursuant to 16 C.F.R. § 3.22(f)

Pursuant to 16 C.F.R. § 3.22(f), Karen A. Mills states as follows:

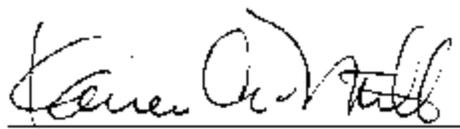
1. I am an attorney for the Federal Trade Commission. I serve as Complaint Counsel in *MSC Software Corporation*, Docket No. 9299. I submit this declaration to document several telephone conversations that I had with Counsel for Respondent, Marimichael O. Skubel and Lisa Horton, in a good faith effort to resolve by agreement issues raised by Respondent concerning Complaint Counsel's First Request for Production of Document and Things (hereinafter "the Document Request").
  
2. I conferred with counsel for Respondent, Marimichael Skubel and Lisa Horton, on several occasions to elicit from Respondent information about the contents and accessibility of Respondent's electronic document systems and archives, including Respondent's e-mail systems, electronic documents, and backup tapes.
  
3. On several occasions, Respondent has made representations which I questioned, or for which I requested additional information or documentation, orally or in writing.
  
4. On several occasions, I explored with Respondent, on my own initiative, the nature and extent of any costs of search or production in response to Complaint Counsel's document request, and whether and how any costs of search or production in response to Complaint Counsel's document request might be mitigated, or avoided.
  
4. By letter of January 30, 2002, for example, I memorialized in writing questions I had posed orally to Respondent about the nature of its backup systems in response to Respondent's letter of January 29, 2002.
  
5. In a telephone conversation with me on January 31, 2002, at 2:53 p.m., Lisa Horton, representing Respondent, with Marimichael Skubel also on the telephone line, told me that in response to the questions I had posed about Respondent's backup

systems apropos of Respondent's January 29, 2002 letter, she had checked with appropriate personnel at Respondent to determine how the backup system functioned, and was indexed. I recorded what Ms. Horton and Ms. Skubel told me in contemporaneous notes. Ms. Horton explained that some backups were performed daily, some weekly, and some monthly. Ms. Horton reported that Respondent's responsible personnel had told her that the Legato Backup system assigns a bar code to each backup tape that corresponds to a database. Ms. Horton further stated that the information in the database includes the name of the server backed up, the individuals whose files were backed up from that server, their partitions on the backup, and the date of the backup. Ms. Horton told me that she was not sure whether the files of each person whose backups were documented in the database assigned to each backup tape were indexed, but she had found out that the persons whose files were on the backup tape were indexed, if not by name, then by user number. Ms. Horton explained that to find the backup tapes of a particular person, one could search the database to find out on which backup tapes that person's files were backed up. Only if the location of the files on the backup tape were not indexed already, she said, would a tape need to be indexed before that person's backup files could be found on the tape. Ms. Horton explained to me that indexing a tape, while taking 7 or 8 hours, was faster than just searching a backup tape for a person's files.

6. At no time did anyone representing Respondent tell me that information contained on backup tapes would be required to be printed for review.
7. On many occasions, I offered on behalf of Complaint Counsel, to consider further modifying the Document Request if Respondent supplied information documenting purported burden claims, and provided Complaint Counsel with the information needed to design and assess proposed modifications. In each case, I specified the type of information needed, and worked diligently with Respondent to determine how Respondent might supply that information.
8. For example, after Respondent identified that it had daily, weekly, and monthly backups, I asked Respondent to explore what each type of backup contained, and whether they might be duplicative, so that we might consider limiting the document request to production of non-duplicative backups.
9. The last contact I had from Respondent on this issue before Respondent filed its Motion was a telephone phonemail message from Respondent on February 1, 2002, at 5:50 p.m., when Marimichael Skubel and Lisa Horton left a message saying that Respondent was trying to get more specific information about what applications were backed up by daily, weekly, and monthly backups, and would try to write it up for Complaint Counsel. Respondent has not contacted me with this information since the Motion was filed.

10. Regarding production of electronic documents, Respondent explained to Complaint Counsel for the first time in a letter of January 29, 2002, that the process of reviewing electronic documents was more expensive and involved than the process of reviewing hard copy documents, because the electronic documents had to be printed before review could take place.
11. After receiving Respondent's January 29, 2002, letter, I telephoned Respondent's counsel to determine why Respondent was printing out the electronic documents. I reminded Respondent's Counsel that Complaint Counsel's Document Request did not require that electronic documents be printed and produced in hard copy. Respondent's Counsel explained to me that Respondent's counsel had elected to print out the paper copy for its own convenience. Respondent's counsel explained that neither Respondent nor Respondent's counsel had the computer software that would allow Respondent to review electronically the electronic documents, and that Respondent did not wish to invest in that kind of software. Respondent's Counsel also explained that Respondent chose to print out paper copy of electronic documents because it believed it would be quicker and easier for Respondent to have paralegals review paper copy of the electronic documents than electronic documents.
12. Respondent did not present to me the information attached to its Motion in the form of an affidavit of Connie Stokes and letters from Merrill Corporation regarding recordkeeping and retrieval from archives, or regarding cost of backup retrieval or electronic document production, before filing its Motion. Respondent did not discuss these issues with me before filing its motion. Larissa Paule-Carres left me a telephone message on the morning of February 14, 2002, saying that she had tried to contact me on February 13, 2002, while I was conducting a deposition of Respondent, that her colleague Colin Kass was defending, but had not left a message that day. In her February 14, 2002, message, Ms. Paule-Carres said that she was headed into a 6 hour meeting, and would not be available for the next several hours. I left Ms. Paule-Carres a return telephone message saying that I would not be available, because, as Respondent knew, I would soon be in the process of traveling to Seattle that day, to take another deposition of Respondent on February 15, 2002, that Marimichael Skubel would be defending. I said in the message that I left for Ms. Paule-Carres that I would be happy to discuss the issues Ms. Paule-Carres wanted to discuss with Ms. Skubel in Seattle, after we had completed the deposition. I also left a telephone message to the same effect on February 14, 2002, for Ms. Skubel on her telephone in Washington. Before the deposition began on February 15, 2002, I told Ms. Skubel that I would be happy to discuss issues Ms. Paule-Carres sought to raise at the conclusion of the deposition. At 6 p.m., when the deposition had concluded, I offered to discuss the issues if Ms. Skubel wanted to. She declined. Respondent made no subsequent efforts to follow up to discuss the issues it said it wanted to discuss with me.

13. On February 26, 2002, I telephoned Respondent to seek additional information about Respondent's archival, e-mail, electronic document, and backup systems, and about the identity of persons on Respondent's search list. I sought clarification of the apparent contradiction between what Respondent represented in its Motion regarding backup tapes, and what my notes reflected Respondent represented to me on January 31, 2002, about backup tapes. I also renewed my request for information about potential overlaps among information backed up daily, weekly, and monthly. I asked Respondent to identify the names of the persons on Respondent's search list of 193 individuals, most of whom never had been identified to Complaint Counsel, and of the job titles of all of those individuals. I renewed my prior invitation to Respondent to propose limitations on the scope of search of individuals' archived, electronic, backup or e-mail files based on Respondent's review of the hard copy documents it already had reviewed, where either (1) it believed based on review of hard copy documents that an individual was not likely to have responsive documents, or (2) it had substantiated basis for claiming that an individual's electronic documents, e-mails, backups, or archived documents likely would be duplicative of hard copy documents already produced. I asked Respondent to identify for the archives (1) what records exist of files sent to the archives in the past year; (2) what records exist of files retrieved from the archives in the past year; (3) what records exist of what files were sent to the archives since January 1, 1999; (4) whether there is an archives code for UAI files, and if so what it is; (5) what records document custodians on the search list have of what they sent to the archives; and (6) whether Respondent searched the archives in response to the Federal Trade Commission's Part 2 investigation document request.
14. On February 28, 2002, Respondent offered to allow me to interview directly the information technology person at Respondent best able to answer questions about the backup system, but the time for an interview has not yet been established. I have not yet received the other information requested.

  
Karen A. Mills

*dated February 28, 2002*

## **Attachment D**

## KIRKLAND &amp; ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.  
Washington, D.C. 20005

202 879-5000

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To Call Writer Directly:  
(202) 879-5034  
Marinichae'\_Skubel@dc.kirkland.com

January 29, 2002

Via FacsimileKaren A. Mills, Esq.  
Federal Trade Commission  
Bureau of Competition  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Subject: MSC Software Inc., Docket No. 9299

Dear Ms. Mills:

You have asked us to predict when we will complete our document discovery. We have collected over 233 boxes to date and more boxes are arriving daily. We have greatly expedited our review of documents as I described in my letter dated January 25, 2002.

Accordingly, I appreciate your acknowledgement today that because of this expedited review, if any privilege documents avoid our screen, you will consider the submission as inadvertent, will return the document promptly, and will not consider such submission as a waiver of any privileges.

We have been processing documents at a pace that roughly equals 50 boxes per week. At this rate, we expect to complete this part of the production by February 15.

We are also in the process of collecting electronic data and e-mail. Interviews with MSC personnel lead us to believe that electronic document collection will be voluminous, roughly twice the size of the hard copy production. In addition, the process of reviewing electronic documents is more expensive and more involved. Documents must be printed before review can take place. We will begin this review as soon as we finish the review of the hard copies.

In light of the burden and expense, we would like to narrow the review of the electronic files. You have asked for a list of employees and the number of boxes of hard documents each has submitted to date. We have sent you a list and are working to update and correct it. Perhaps a better way of narrowing the search to reduce the burden would be to review an organization

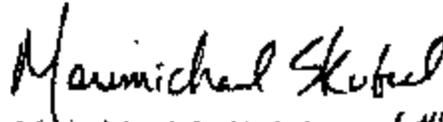
KIRKLAND & ELLIS

Ms. Mills  
January 29, 2002  
Page 3

chart and select persons whose positions indicate that they are likely to have the most relevant documents.

You have also asked us to give you a date for the production of data responsive to Specification 22. I expect to have this answer shortly.

Respectfully,

  
Maximichael O. Skubel (HQA)